Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

PETITION FOR RECONSIDERATION

Submitted by

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SUMMARY

On June 2, 2003, the Commission adopted new local television ownership rules allowing common ownership of two television stations in markets with 17 or fewer television stations; provided, however, a single entity may not acquire an attributable interest in more than one station ranked among the top-four stations in the market based on audience share. Nexstar Broadcasting Group, L.L.C. ("Nexstar") hereby requests that the Commission reconsider its decision prohibiting the acquisition of two top-four ranked television stations in the same Designated Market Area ("DMA"). The Commission's top-four prohibition is particularly harmful to medium and small market broadcasters who are struggling to survive in a world with high DTV conversion expenditures that produce no revenue benefits and loss of network compensation.

Nexstar submitted comments and reply comments to the Commission in this proceeding, providing the Commission with ample information about the benefits of common station ownership in medium and small markets and the financial needs of small market stations for common ownership. The Commission recognized the soundness of Nexstar's comments, yet inexplicably determined to prohibit common ownership in markets where it is most needed and essential for stations' survival – medium and small markets.

The Commission concluded that allowing common ownership of two top-four ranked stations in the same market would harm viewers by diminishing programming choices, including local news. However, the Commission's determination is unsupported by the record. Two stations in the same market will have different programming as a reflection of their different network affiliations. In addition, common owners have incentive to produce diverse news programs in order to reach the widest possible audience.

Moreover, the Commission treats all medium and small market stations the same, disregarding variation in markets. In many medium and small markets the top two stations are significantly more dominant that the third and fourth ranked stations. Yet the rule as adopted prevents the third ranked station from acquiring the fourth ranked station even where their combined ratings share would be substantially below the rating share of the second ranked station.

Furthermore, allowing such common ownership can lead to increased local news programming. In markets where Nexstar produces local news for a second station it has increased the amount of local broadcast TV news available in the market by an average of 43 percent. Nexstar has done this despite the fact that studies have shown news operations ranked third or fourth in medium and small markets will always be unprofitable. In markets below the top 50 DMAs, 113 of the third and fourth ranked stations do not produce their own local news. As the Commission has recognized, local affiliates are necessary to promote localism. Without providing an opportunity for common ownership of two top-four ranked stations in medium and small markets, such stations will struggle to survive and likely will not be able to afford the luxury of providing local programming.

Nexstar urges the Commission to reconsider its decision and allow the owner of a top-four ranked station to acquire another top-four station in the same market. In markets below the top-50 DMAs, a television broadcaster with no other media interests in the market should be allowed to acquire a second station in the market regardless of the second station's ranking. Only when the Commission allows such ownership will it ensure the survival of localism in medium and small market television.

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PETITION FOR RECONSIDERATION

Nexstar Broadcasting Group, L.L.C. ("Nexstar"), by its attorneys, hereby requests reconsideration of the Commission's Report and Order in the above-referenced rulemaking proceeding.[1] Specifically, Nexstar asks that the Commission reconsider its decision to prohibit the owner of a top-four ranked television station in a Designated Market Area ("DMA") in markets ranked below DMA fifty (50) from acquiring a second "top-four" station in the same market.

On June 2, 2003, the Commission adopted a new local television ownership rule allowing common ownership of two television stations in markets (defined by DMA) with 17 or fewer television stations, and ownership of up to three stations in markets with 18 or more television

[1] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, MB Docket 02-277, released July 2, 2003 ("*Order*").

stations; however, a single entity may not acquire an attributable interest in more than one station ranked among the top-four stations in a market based on audience share. *Order* at para. 134. In essence, this decision provides regulatory relief to those that least need it – large market stations – while ignoring those that most need such duopoly relief for their very survival – medium and small market stations. Medium and small market stations, particularly the third and fourth ranked stations in such markets, are struggling to survive. They are faced with high expenditures for conversion to DTV as well as loss of network compensation. Many stations with third (or fourth) ranked news programs continue to lose money. Indeed, due to the high costs associated with producing local news, some of these stations are unable to produce their own news and other local programming. Without meaningful duopoly relief in medium and small markets, smaller companies will continue to eliminate expensive local news programming and may be squeezed out of business altogether. Therefore, the Commission should reconsider its decision to prohibit acquisition of a second "top-four" station in DMAs ranked below the top 50.

I. BACKGROUND.

Nexstar, through subsidiaries, owns and operates sixteen TV stations in fifteen DMAs. All of Nexstar's stations are in medium and small markets (DMAs 53-193). Nexstar participated in the rulemaking proceeding and advocated changing the local television duopoly rule to allow common ownership of two television stations in any market with four or more commercial stations.[2] Nexstar provided extensive information about how local television duopolies result in better local television service to the public. Nexstar explained that it has entered into relationships with other in-market stations which do not result in Nexstar having an attributable

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[2] Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC submitted to the Commission on January 2, 2003 ("*Comments*") and Reply Comments submitted on February 3, 2003.

interest in such stations but allow for greater efficiency of operations for both stations. *Comments* at p. 3. However, Nexstar also informed the Commission that these relationships are not a substitute for the ability to own two stations in one market, stating that "although these arrangements have resulted in some efficiency of operations, they do not allow the full cost savings that are possible through the ownership of two stations." *Comments* at p. 4.

Nexstar provided extensive information about how its relationships with other stations in its markets result in more local news and programming choices for viewers and better service to the community. *Comments* at Appendix A. Nexstar demonstrated that the significant efficiencies inherent in joint ownership and operation of two television stations in the same market lead to increased news and public affairs programming and improved entertainment programming, and provide more diversity of viewpoints to viewers. *Comments passim*. Finally, Nexstar pointed out that allowing common ownership of two stations in one market would help push the transition to digital operations by helping medium and small market stations accumulate the funding required for DTV conversion while maintaining the stations' ability to broadcast quality programming and hire qualified employees. *Comments* at p. 21.

The Commission recognized the validity of Nexstar's comments (and similar submissions from several other parties), stating that "joint operations can eliminate redundant studio and office space, equipment and personnel, and increase opportunities for cross promotion and counter programming," and that "these efficiencies and cost savings . . . should be available to stations in a larger number of DMAs." *Order* at para 147. Yet the Commission's decision to prohibit acquisition of a second "top-four" station in <u>all</u> markets ignores the plethora of evidence in this proceeding showing that such joint ownership is urgently needed in small and medium markets. The Commission apparently did so because of its concern about theoretical and unspecified potential competitive harms arising from mergers between two top-four ranked local broadcast stations, and a concern about loss of local programming. However, upon scrutiny, the Commission's reasoning is faulty; permitting such common ownership will hurt neither competition nor local news programming. Moreover, permitting such common ownership of two "top-four" stations in markets below DMA 50 in many cases may be essential for such stations' survival.

II. PERMITTING COMMON OWNERSHIP OF TWO TOP-FOUR RANKED STATIONS IN ONE MARKET WILL NOT HARM COMPETITION.

A. Common Ownership of Two Top-Four Ranked Stations Will Not Affect the Choices of the Viewing Audience.

The Commission states throughout the local television section of the *Order* that it is concerned with competition issues with regard to viewing audiences. For example, the Commission states that "what is critical to our competition policy goals . . . is the assurance of a sufficient number of strong rivals actively engage in competition for viewing audiences." *Order* at para. 141. The Commission further states that common ownership "might adversely affect the types or characteristics of programming offered by the merged entities to the detriment of viewers." *Id*. at para. 150.

The Commission has determined that allowing common ownership among the top-four ranked stations will diminish competition for viewing audience.[3] Yet, this determination has no rational basis. The Commission ignores the fact that two commonly-owned stations will still compete with each other for viewing audience. Both stations will broadcast different

[3] Nexstar notes the Commission dismissed Nexstar's proposal that the duopoly rule be modified to permit common ownership of two television stations in the same DMA because such ownership is likely "to result in harm to competition in the local DVP markets." However, it is clear that, at least in the smallest markets, viewers likely will have more and better programming choices if, for example, the third and fourth ranked stations can merge.

programming, including different local programming, to attract the widest possible audience. As Nexstar previously stated, "the programming broadcast on the second stations generally is different as a function of separate network affiliations and selections of syndicated programming," *Comments* at p. 11. And, under Nexstar's local service agreements, "each station also includes news content which is unique to that station." *Id.* at p. 8.[4]

The Commission further determined that permitting a top-four station to acquire another top-four station in a market would reduce incentives for stations to improve programming that appeals to mass audience. *Order* at para. 200. The Commission stated that "[b]ecause top-four ranked stations typically offer programming designed to attract mass audiences . . . a new popular program offered by one of the top-four ranked stations will have a substantial negative impact on the audience shares of the other top-four ranked stations." *Id.* This is incorrect. The top-four stations are generally affiliated with the top-four networks (ABC, CBS, NBC and Fox) and thereby routinely broadcast network programming. The networks have no incentive to ignore the development of strong counter-programming and generally seek to develop programming that will do better than the other networks' programs. In addition, it is pure speculation to assume that a station would concede a non-network time period to its co-owned station's new popular programming by failing to counter-program with the strongest possible program(s). Such an action would be short-sighted because it harms station revenues.

The Commission adopted an artificial "break point" between the fourth ranked station in a market and the remaining stations. The Commission found that "in local markets, there is a general separation between the audience shares of the top four-ranked stations and the audience

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[4] *See also* Reply Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC, submitted February 3, 2003 at Exhibits C and D (showing the differences in local newscasts produced by the same entity for two different stations).

shares of other stations [and that] in markets with five or more commercial stations (*i.e.*, 120 markets) . . . the fourth ranked station was at least two percentage points ahead of the fifth ranked station." *Order* at para. 195. The Commission plainly believes two percentage points is a significant difference. *Id.* Accordingly, in many of the markets below 50, which frequently have five or fewer commercial stations, any drop-off between stations' audience shares of two or more percentage points should be considered a significant disparity. On that basis, the Commission should permit the owner of a top-four ranked station to acquire another top-four station in the same market if the station can show a difference of at least two percentage points between the stations seeking to be under common ownership.[5]

Furthermore, the Commission disregards evidence that the top two stations combined generally have approximately 30 percent of total audience share, while the third and fourth ranked stations combined generally have only 14 percent of total audience share.[6] *Nielsen Media Research Total Day Shares as complied by BIA*. Yet the rule as adopted prevents the owner of the third ranked station from also acquiring the fourth ranked station even if their combined ratings share is less than that of the number two ranked station. Under the rule, the most dominant station in a market can be owned by a major network which also owns cable networks, and may own any other station so long as the second station is ranked fifth or lower. And in

[5] A review of markets in which Nexstar and a related company, Quorum Broadcast Holdings, LLC, operate shows there is no such natural ratings "break point" in medium and small markets. In eight of Nexstar's and Quorum's combined 26 markets, there is at least a four percent ratings share difference between the third and fourth ranked stations. (*BIA Investing in Television 2003, 2nd Edition*). Also, in eight of those markets there is a break of at least five percent ratings share between the second and third ranked stations. *Id.* In nine of the markets, the number one station is clearly dominant with a ratings lead of at least four percent; and in some markets, there is more than a ten percent greater ratings share between the first and second ranked stations. *Id.*

[6] The Commission states that "[n]ationally, the Big Four networks each garner a season to date prime time audience share between ten and 13 percent." *Order* at para. 195. However, in Nexstar's and Quorum's markets, the Fox network generally garners an audience ratings share of seven percent or less. And in a few of these markets, another Big Four affiliate garners a less than ten percent audience ratings share. The Commission should not assume that facts which are applicable to the larger markets translate to medium and small markets.

many markets, the local newspaper can buy a station. And the local cable television system can buy a station. But a local top-four station owner cannot buy the fourth ranked station even if both stations are struggling to survive.

B. The Commission Ignores Local Cable in Its Competition Analysis.

The *Order* also brushes off competition at the local level between local television stations and cable companies by focusing solely on national cable programming rather than cable operations as a whole. The Commission states that "broadcast television stations and cable networks may respond differently to changes in local market concentration," and "[we] continue to draw a distinction between television broadcast stations and cable networks." *Order* at paras. 145, 191. However, because the Commission's economic competition analysis focuses only on the national programming aspect of cable television, it fails to include in its analysis the impact of competition from local cable television sales rep firms ("interconnects"), which sell local advertising for national cable programming services. These interconnects compete directly at the local level against television broadcast stations for advertising revenues.[7] In addition, television stations compete with these local cable interconnects for sales staff. Yet because television stations do not have dual revenue streams (from subscription fees and advertising revenue), television stations are not able to pay their staffs as much as the cable companies. Although a change in the local market may not affect a cable company at the national level, such change will impact the company at a local level. Nexstar urges the Commission to consider local cable competition as it reconsiders whether to allow a top-four ranked television station to acquire another top-four station in the same market.

[7] Indeed, in many markets the cable interconnects have local advertising sales revenues higher than the fourth or even the third ranked broadcast TV station in a market.

The Commission stated that top-four ranked combinations are likely to harm competition and are less likely to produce offsetting public interest benefits. *Order* at para. 212. The Commission is mistaken. Permitting common ownership of two top-four ranked stations will produce the same public interest benefits as all other common ownership opportunities – better and more local news and other programming, a better ability to make the digital transition, a better ability to compete with other media, and most importantly in smaller markets, survival of operations. In markets below DMA 50, a television broadcaster with no other media interests in the market should be able to acquire a second television station in the market whether such stations are ranked in the top-four or not. Otherwise such stations may be forced to reduce local programming merely to survive.

III. PERMITTING COMMON OWNERSHIP OF TWO TOP-FOUR RANKED STATIONS WILL NOT LEAD TO LESS LOCAL NEWS PROGRAMMING.

The Commission states that it is concerned that an owner of two TV stations in a market might decide to cancel local news programming on one of its stations. *Order* at para. 190. Although the Commission is right to be concerned about the level of news programming available to viewers, its assumption that common ownership will lead to less news is not supported. Nexstar, under its quasi-duopoly relationships, has increased the amount of local news available in its markets by an average of 43 percent. In addition, as Nexstar explained in its May 16, 2003 *ex parte* submission, in Erie, Pennsylvania, joint operations actually have increased the amount of local news programming available for viewers. Nexstar stated that it owns the ABC affiliate (which currently is ranked third in the market) and is involved in a grandfathered time brokerage agreement with the Fox affiliate (which is ranked fourth). Before this time brokerage agreement, the Fox affiliate was struggling merely to remain on-the-air and had no local news. Now, pursuant to the time brokerage agreement, Nexstar produces a 10:00 p.m. local news program for broadcast on the Fox affiliate, as well as an 11:00 p.m. news program broadcast on Nexstar's station. Under the new rule, when the time brokerage agreement ends or is terminated by the Commission, the Fox station will be back to barely surviving, and most likely will stop broadcasting local news. Allowing common ownership of these two stations will produce efficiencies that enable local news programming to remain available on the fourth ranked station in the market. Nexstar confirmed other such increases in local news and other programming in its *Comments.* At all of the stations where joint news sharing operations are in effect, there has been expanded and/or improved local news. *Comments* at pp. 4-5, Appendix A.

The Commission's determination to restrict common ownership of two top-four ranked stations also ignores the numerous comments confirming that the rising cost of producing news is forcing broadcasters to reduce news production. *See* Comments of Gray Television, Inc. at pp. 17-19; Duhamel Broadcasting Enterprises at pp 5-6; Granite Broadcasting Corporation at pp 6-7; and National Association of Broadcasters at pp 75-78. In fact, studies submitted in this proceeding have shown that in medium and small markets the third ranked local news operation will always be unprofitable. In those markets where Nexstar's station is ranked third in news, the station is losing money producing local news. For example, Nexstar's station KBTV, Port Arthur, Texas (DMA #137), is the third ranked station in local news ratings in a three station market. In 2002, this station lost approximately $490,000 on its local news production. And Nexstar's station WROC, Rochester, New York (DMA #77), lost approximately $883,000 in 2002 producing local news as the third ranked news operation. In markets below the top fifty DMAs, 69 of the number four ranked stations do not produce their own news, and in markets below the top ninety DMAs, 44 of the number three ranked stations do not produce their own local news. Even worse, in DMAs 157 and below, 15 of the number two ranked stations are not producing local news.[8]

Moreover, Nexstar notes that the Commission remains committed to ensuring that communities' local needs are met even if stations are permitted to have common ownership. On August 20, 2003, Chairman Powell announced a series of initiatives designed to enhance localism among radio and television broadcasters.[9] As the Chairman recognized, the Commission's ownership rules are, "at best, imprecise rules for achieving policy goals [such as] localism." *Id.* Accordingly, the Commission should not impose a rule which actually harms medium and small market stations' abilities to achieve an important policy goal, when the goal can otherwise be achieved. The Commission can permit common ownership of two top-four ranked stations in the same DMA and still ensure that local news and other programming obligations are being fulfilled.

IV. PROHIBITING TOP-FOUR ACQUISITIONS HARMS MEDIUM AND SMALL MARKET STATIONS.

The issue of local television duopolies is not about profits for medium and small market television broadcasters. It is about survival. In many markets smaller than the top 50 DMAs, the third and fourth ranked stations struggle to survive. As the record clearly demonstrates, owners of television stations in medium and small markets are experiencing greater competitive difficulty than stations in larger markets. Medium and small market stations are being forced to

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[8] Nexstar conducted a phone survey of all top-four stations in markets below the top 50 asking whether such stations produce their own local news programming.

[9] FCC Chairman Powell Launches "Localism in Broadcasting" Initiative, News Release, released August 20, 2003.

make digital expenditures, are losing network compensation and are faced with significant competition from non-broadcast program channels. As the Commission recognizes, "the data confirm that the ability of local stations to compete successfully . . . is meaningfully (and negatively) affected in mid-sized and small markets." *Order* at para. 201. Yet the Commission's decision to prohibit top-four acquisitions has precisely the opposite effect – it allows TV duopolies in markets where stations do not need duopoly relief while preventing acquisitions of stations which most need such relief. Permitting acquisitions of two top-four ranked stations in medium and small markets is absolutely necessary to ensure strong local affiliates.

The Commission also denigrates the cost of the DTV transition in medium and small markets, stating that "the top four stations can afford the DTV transition." *Order* at para. 199. This is a fallacy in many medium and small markets. Many of the top-four ranked stations in these markets have struggled to find the funding necessary to initiate even low power digital transmissions. Simply because some of these stations have found a way to begin low power operations (under the threat of sanctions for noncompliance) does not mean these stations will be able to afford the $600,000 to $1 million that will be necessary to upgrade their digital operations to full-power.[10] All medium and small market television stations must make the capital expenditures necessary to build digital transmission facilities, yet there is no realistic hope that the stations will generate revenue from those expenditures any time soon. The Commission should recognize that mergers of two top-four ranked stations in medium and small markets will allow these stations to facilitate their transition to full power DTV operations through cost

[10] The Commission cites to an NAB study <u>in the top 25 DMAs</u> in support of its contention that the big four network affiliates can afford the DTV transition. These markets have combined annual revenues in the billions. However, in medium and small markets the annual revenues for the entire market may be as low as six million dollars.

savings generated by shared equipment, personnel and experience, while preserving their ability to meet normal operating expenses and ensure quality local programming.

Moreover, the Commission in this *Order* has increased the national television ownership cap, allowed newspaper and television joint ownership, and loosened the radio/TV cross-ownership rules, thereby granting all but pure television companies meaningful regulatory relief. But it is the medium and small market television broadcasters who help maintain diversity of ideas and economic competition in local markets. As the Commission stated while justifying the retention of the national ownership cap, separately-owned television station groups will "facilitate a rapid and efficient transition to digital broadcast television." *Order* at para. 532. Local affiliates are necessary to promote localism. *Id.* at para. 546. Yet without providing medium and small market stations duopoly relief by allowing mergers of two top-four ranked stations in markets below DMA 50, the Commission will not be able to count on local affiliates to counterbalance the increased national ownership cap.

V. REQUIRING BUYERS TO SEEK WAIVERS TO ALLOW ACQUISITIONS RESULTING COMMON OWNERSHIP OF TWO TOP-FOUR RANKED STATIONS ONLY CREATES UNCERTAINTY.

The Commission states that it will consider waivers of the top-four station merger restriction under certain circumstances. *Order* at para. 213. However, granting waivers of the rule is not the solution to the Commission's blanket prohibition of mergers of two top-four ranked stations in the same market. Waivers only create uncertainty. Will a seller be willing to sell to a buyer who requires a waiver when there can be no certainty that the Commission will grant such waiver? Further, the economic value of a "waiver combination" will be impossible to determine because the "waiver combination" cannot be freely transferred to a new owner without the new owner justifying a continued need for the waiver, which may not be granted. This creates uncertainty in valuing the combination in the company's assets (and determining a selling price should the waiver owner seek to sell the combination). Moreover, a waiver combination also significantly raises the transaction costs associated with selling the stations. If a continued waiver is not granted to the new owner, the selling owner must sell the stations separately, which will require the separation of operations that have been combined for a number of years, a very costly proposition that unjustifiably punishes an owner for improving the operations of the stations.

Nonetheless, if the Commission intends to use a waiver process, it should clarify the waiver standard. The waiver criteria as set forth in the *Order* state that a waiver may be granted if (1) allowing the combination reduces a competitive disparity in the market, (2) allowing the combination speeds the digital transition, (3) allowing the combination significantly increases local news and programming, or (4) allowing the combination produces other public interest benefits. *Order* at paras. 228-230. In addition, the FCC will consider granting a waiver to allow two UHF stations to combine. *Id.* at para. 230. Although these criteria provide some guidance, they are too vague for buyers and sellers of stations to know what is required to receive a waiver. Some of the questions raised by the criteria's vagueness are: Do all of these factors need to be present? What level of competitive ratings disparity needs to exist between the market leader and the merging stations? Can the merging stations eliminate a ratings disparity and have a combined rating that is greater than the dominant station or must the merging stations continue to have a ratings disparity against the market's top station? What type of information is required regarding the digital transition? What is a significant increase in local news and programming? What other public interest benefits do the combined stations need to generate? Without further clarification, parties will have no real certainty in entering a transaction which requires a waiver of the Commission's top-four rule as to whether such waiver will be granted.

The uncertainty of what is required for grant of a waiver and the uncertainty of transferring a "waiver combination" diminish the usefulness of the Commission's decision to consider such waivers. Sellers likely will avoid selling their stations to any buyer who requires a waiver because of the inherent uncertainty in whether the sale will close. If the Commission intends to use a waiver process it should establish conditions under which a grant of a waiver will be presumptive. This will take some of the uncertainty out of the waiver process and may increase the value of the station in question. Moreover, once granted, a "waiver combination" should be transferable to another owner without the impossible task of rejustifying the waiver under changed circumstances. Requiring rejustification simply is not feasible, adds very high transaction costs and creates tremendous uncertainty in the valuation of the stations.

In addition, the Commission should specify that the Media Bureau has delegated authority to act on such waiver requests. Requiring full Commission action on each waiver request will unduly delay action on waiver requests and may diminish sellers' willingness to sell to buyers who will require waivers.

VI. CONCLUSION.

WHEREFORE, for the foregoing reasons, Nexstar respectfully urges the Commission to reconsider its decision to prohibit one entity from having attributable interests in two television stations ranked among the top-four in a DMA and urges the Commission to allow common ownership of such stations in all DMAs ranked below number fifty.

Respectfully submitted,

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